

Cambridge University Press  
978-1-108-47076-6 — Genetic Resources, Justice and Reconciliation  
Edited by Chidi Oguamanam  
Excerpt  
[More Information](#)

---

PART I

The Evolution of the ABS Policy  
Landscape in Canada

## 1

## The ABS Canada Initiative

*Scoping and Gauging Indigenous Responses to ABS**Chidi Oguamanam*

## Abstract

This chapter has three objectives: (1) to explain the concept and context for access and benefit-sharing (ABS) in Canada, (2) to outline the undergirding methodology and process for the research that resulted in this book and (3) to provide a concise annotation of the component chapters and demonstrate their cohesiveness in tackling the global challenge of ABS over genetic resources and associated traditional knowledge through Canadian insights.

## INTRODUCTION

This edited collection focuses on the topical subject of how researchers, the private sector and various other interests obtain genetic resources from Indigenous territories for research and development of products related to pharmaceuticals, health, personal and sanitary care, agriculture, food, cosmetics, environmental management, etc. Often, these genetic resources are obtained in association with Indigenous peoples' knowledge – also referred to as traditional knowledge (TK) – of the uses of genetic resources, which have proven valuable for researchers and industries in the making of new products. Mindful of concerns about their inadequacy, we use the terms Indigenous knowledge and TK interchangeably without distinction. Historically, Indigenous or Aboriginal peoples' (terms deployed here ambidextrously and interchangeably also in their pragmatic essence)<sup>1</sup> relationship with researchers or industry bio-prospectors is fraught with suspicion. Research has been conducted by non-Indigenous peoples and entities, and the results and benefits of the research rarely applied to the communities whose Indigenous knowledge and genetic resources contribute to valuable research outcomes. This phenomenon is global and not just particular to Canada. It has given rise to international outrage symbolized in the concept of 'biopiracy.' Biopiracy refers

to the global exploitation of genetic resources in Indigenous and local communities by external interests. These external interests seek intellectual property rights (mostly patents) without adequate forms of compensation or equitable partnership with the peoples or communities who provide the genetic resources and the knowledge required to unlock the resulting ‘innovations.’

Since the 1990s, the international community has intensified efforts designed to address the injustice in the inequitable use of genetic resources and associated Indigenous knowledge through the concept known as access and equitable benefit sharing (ABS). ABS recognizes that global biological resources – including genetic resources – are essentially the heritage of humankind and should be accessible to those who seek to utilize them for various ends, including research and development, without undermining the interest of the various custodians who conserve those genetic resources. Consequently, the process for accessing those resources must be mediated by equitable framework(s) for sharing benefits arising from their use by all stakeholders, including Indigenous peoples. So far, there is a complex range of international legal instruments and policy initiatives on ABS such as the Convention on Biological Diversity (CBD), its Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing over Benefits Arising from their Utilization (NP), and the International Treaty on Plant Genetic Resources for Food and Agriculture (IT). An underlying premise of these instruments is that Indigenous peoples and Local Communities’ (IPLC) epistemic orientations and worldviews regarding genetic resources have strong conservation ethics. As such, ABS is a form of incentive directed at objectives related to justice and equity, support for conservation of genetic resources and mitigation of the earth’s ever-intensifying biodiversity crisis.

For the purposes of this book, it is important to note that while Canada is a party to the CBD and the IT, it has yet to accede to the NP, citing its lack of preparedness to implement ABS into domestic law. The NP and the subject of ABS generally raise complex issues that strike at the heart of Indigenous peoples’ search for equity, justice and reconciled relations with the governments of Canada and the country’s universities, researchers and corporate sector. These historic relationships with Indigenous peoples have been rancorous and a source of great suspicion and distrust. ABS implicates Canada’s relationship with Indigenous peoples in many interconnected and overlapping ways, including resource ownership, Indigenous treaty and constitutional rights, cultural appropriation, the role of Indigenous legal traditions, knowledge systems, heritage and worldviews over the conservation of biological diversity, and environmental stewardship. In 2016, Canada withdrew its lingering reservation against the United Nations Declaration on the Rights of Indigenous peoples (UNDRIPs) and has fully endorsed the instrument in accordance with federal government’s ‘reconciliation agenda.’<sup>2</sup> Within and outside the NP framework, researchers, industry and bio-prospectors have continued and will continue to deal with Indigenous peoples, their genetic resources and associated traditional or Indigenous knowledge.

Contributions in this volume seek to explore the diversity of issues implicated in ABS with deliberate sensitivity to Indigenous peoples as key partners. These contributions add to mapping and conjecturing the pathways through which Canada and Indigenous peoples can effectively forge constructive partnerships to fully engage ABS as a crucial subject matter in Canada-Indigenous relations at a time when reconciliation with Indigenous peoples is official government policy. Canada's experience will resonate with many other industrialized countries, especially those with a history of colonial relations with Indigenous peoples.

#### ACCESS AND BENEFIT SHARING: CONSENSUS IN STALEMATE

In 2012, the government of Canada indicated that it would not ratify the NP citing lack of preparedness. Having advised Canada to refrain from ratifying the Protocol, Indigenous peoples argued that the Protocol was negotiated without consultation and therefore without their consent. What Canada may or may not do with the Protocol was not clear to them. Suspicion remains rife. So, for once, both parties are in agreement but for different reasons. Historically, Canada rarely agrees with Indigenous peoples on any issue. But the issue of ABS provides an extraordinary exception. Canada and its Indigenous peoples seem to agree on the need for more time to enable constructive engagements on ABS among stakeholders. Across diverse government departments with mandates that engage or are engaged by ABS, there is presently neither a clear pathway nor a strong interdepartmental strategy on the ABS file. The issue is effectively stalled.

Some attempts by the government to start the conversation on ABS, post-Nagoya, have been at best superficial without the substantive involvement of Indigenous peoples. The latter's lingering suspicion on the government's motives is historically informed. Perhaps more specifically, it is deeply influenced by Canada's role at the negotiations of the NP, which was, arguably, perceived by Indigenous peoples at home as pro-industry and anti-Indigenous interests despite the best efforts of Canadian leadership as permanent co-chair of the ABS negotiations. Such a disposition is consistent with the posture of many of Canada's industrialized country allies. At the very least, realistically, there are three major partners on ABS: the various levels of governments in Canada (federal, provincial/territorial and municipal), research/industry stakeholders and Indigenous peoples. The latter have yet to be taken seriously as key stakeholders in ABS.

#### THE ABS CANADA RESEARCH INITIATIVE: NETWORKING, PARTNERSHIP AND COLLABORATION

In 2011, the first major academic piece in Canada on the NP and ABS, following the signing of the Protocol in 2010, kicked off the conversation over how Canada can best position itself on the subject. Titled 'Genetic Resources & Access and Benefit Sharing: Politics, Prospects and Opportunities for Canada after Nagoya'

(Oguamanam, 2011), the study evaluated Canada's unique and complex ecological profile and its rich Indigenous knowledge heritage. It found that Canada is both a user and producer of genetic resources as well as endowed with many Indigenous peoples, cultures and knowledge systems. The paper concluded that such a status requires the country to show leadership and play a proactive role on ABS, which is inclusive of industry and Indigenous interests. That study provided the impetus for building a research team that successfully applied for an Insight Grant from the Social Sciences and Humanities Research Council (SSHRC) in 2014, titled 'Toward an Indigenous Sensitive ABS Policy in Canada.' This project is premised on the need to start a national dialogue and raise awareness on ABS among various stakeholders, especially Indigenous peoples, and enable all interests to engage one another as Canada mulls the NP.

The SSHRC initiative attracted other supplementary funders and partners resulting in the founding of a research network of professors, researchers, students and Indigenous organization partners, known as ABS Canada ([www.abs-canada.org](http://www.abs-canada.org)). Among other things, its mandates include the identification and collaboration with Indigenous institutional and other partners for the articulation of Indigenous perspectives on ABS as part of Canadian ABS framework. Also, the project aims to engage policymakers at federal, provincial and territorial levels in the area of awareness raising, networking, collaborative training and capacity building on ABS toward an equitable policy outlook that is sensitive to Indigenous interests and concerns.

#### SCOPING THE INDIGENOUS PULSE ON ABS THROUGH PARTICIPATORY ENGAGEMENT

The ABS Canada initiative organized a series of focus groups and interactive sessions on a regional basis, in partnership with Indigenous organizations and leaders. The first one was in Moncton, New Brunswick for the maritime region in 2015; the second event was held in Ottawa, Ontario for central Canada in 2016; and the last focus group was held in Saskatoon, Saskatchewan for the Prairies and Western Canada in 2017. In a participatory and collaborative environment, through these forums, the ABS Canada research network facilitated a national conversation that gauged Indigenous sensitivity, built capacity and attempted to garner a cross-section of Indigenous perspectives on the subject of ABS. A unique aspect of the partnership with Indigenous participants is the discretion reserved to Indigenous peoples to raise their own account and resolutions arising from the focus groups.<sup>3</sup> The Maritime Aboriginal Peoples Council was able to leverage that discretion by issuing the *Petkoutkoyek Statement on the Access, Use, and Fair and Equitable Sharing of Benefits Arising Out of the Utilization of Genetic Resources and Associated Traditional Knowledge in Canada* promulgated at Petitcodiac (Petkoutkoyek), Moncton, New Brunswick on 16 October 2015. The Petkoutkoyek Statement

dovetails with the 2011 *Iskensisk Declaration on the Access, Use, and Fair and Equitable Sharing of Benefits Arising Out of the Utilization of Genetic Resources and Associated Traditional Knowledge in Canada*, issued in Iskenisk, Mi'kma'k, Truro, Nova Scotia, on 28 March 2011. The *Iskensisk Declaration* is perhaps the first major exclusively Indigenous declaratory response and initiative on ABS issues in Canada. It is discussed in greater detail in Oguamanam and Roger Hunka's contribution to this volume (Chapter 3).

In addition to Indigenous peoples' active participation, all of these focus groups were resourced by keynotes and capacity building sessions from globally renowned experts on ABS from within (including Indigenous experts) and outside of Canada and, in some cases, with institutional support from the Secretariat of the CBD and the Food and Agriculture Organization. With the further assistance of the Open African Innovation Research (Open AIR) ([www.openair.org.za](http://www.openair.org.za)) – one of ABS Canada's partners – and the generosity of several African delegations, ABS Canada personnel participated at the World Intellectual Property Organization's Intergovernmental Committee on Intellectual Property and Genetic Resources, TK and Folklore (WIPO-IGC) in a symbolic gesture of south-north development and capacity building. The WIPO-IGC is charged with developing text-based instrument(s) for effective protection of a range of subject matters pursuant to its self-explanatory nomenclature. In the WIPO-IGC, ABS and incidental matters, including disclosure of source of origin or genetic resources and associated TK in intellectual property, especially patent application, constitute key cross-cutting issues at the jurisdictional intersection of the WIPO and the CBD. Owing to serving as facilitators and active observers of the interchanges in the earlier-enumerated forums, ABS Canada teased out wide-ranging issues on the subject of ABS with consideration for Indigenous peoples as key stakeholders in the Canadian context.

Aside from the Canada-wide focus groups, ABS Canada also partnered with the College of Law at the University of Saskatchewan in organizing a highly successful symposium on 11–13 May 2017 in Saskatoon. The symposium drew Indigenous youth, thought leaders, Canadian academics and researchers who work in the area of ABS. Open AIR sponsored the attendance and participation of members of African Indigenous and local communities to the symposium who shared their experience on ABS with their Canadian counterparts as one of the highlights of the symposium.

Presenters at the symposium were shortlisted from entries received in response to a call for papers. In addition to two keynotes, a total of fourteen presentations were made at the symposium. Complemented by the editor's articulation of the insights from the three focus groups, the resulting papers from those presentations from members and partners of ABS Canada are presented in this book. The diversity of participants, their opinions and views from the focus groups as well as the diversity of categories of contributors in terms of this disciplinary backgrounds, practical

experiences and research profiles in the areas of ABS, Indigenous rights, research ethics, international governance, development and sustainability, is evident in the robust range of arguments and perspectives on ABS in the following chapters. Collectively, the chapters provide multifaceted insights for stakeholders in Canada thereby laying the foundation for future research and policy direction on ABS in Canada and globally.

#### STRATEGIC RESEARCH APPROACH TO A COMPLEX SUBJECT

The edited collection distinguishes itself through a unique mixture of research methodologies. As explained earlier, these involve sourcing opinion and data through on-the-ground participation and partnership with Indigenous peoples; engaging expert resource persons, specialist researchers and scholars; and facilitating their interactions with Indigenous peoples on the subject matter in the course of our research. In addition, the undergirding research and resulting publications are inspired by the opportunity for action on ABS in ways that seek to fill the void between the government and Indigenous peoples on how to move the ABS conversation forward. With eyes on advances on ABS from other jurisdictions since the NP came into effect, the book will be a crucial and handy instrument for all interests in ABS at a time of official stalemate on how to move the conversation forward. Perhaps more importantly, given Canada's bold initiative on reconciliation and the recent endorsement of the UNDRIPs, this project would contribute in complementing and advancing the reconciliation discourse in the direction of ABS – a subject that draws on multidepartmental or multisectoral interests at many levels of governments across the country.

#### ABS ISSUES: WIDE-RANGING AND INTERLINKED

Three years of partnership, collaboration and participation by and with Indigenous peoples on the issue of ABS in the Canadian context, albeit with broader ramifications for the global stage, have uncovered an open-ended catalogue of concerns that an Indigenous-sensitive ABS policy must address. As a crucial matter, Indigenous peoples have raised the issue of the trust deficit that historically characterized their relationship with the colonial state. The trust deficit runs deep in the ABS context, as Indigenous peoples accuse Canada of both failing to consult with them and not representing their interests at the NP negotiations, as well as other related antecedent and current initiatives relevant to ABS. Specifically, participants 'decried Canada's informal preference for the term "Indigenous and Local Communities," [over Indigenous peoples and Local Communities] as an attempt to undermine the [UNDRIPs]' (ABS Canada, Moncton Focus Group Report, 2015, 5).<sup>4</sup> The trust question echoes beyond Indigenous peoples' relationship with the government, to include their long-running rancorous relationship with non-Indigenous researchers,

bio-prospectors and corporate entities. There is a shared impression among Indigenous peoples that Canada's lukewarm approach to ABS emanated from its prioritization of its status as a user of genetic resources and a biotechnology powerhouse for which the country panders to corporate interests (Oguamanam, 2011). This stands in contrast to Canada's dual status as both a user and a provider of genetic resources with associated Indigenous knowledge – a situation that requires the country to seriously consider Indigenous peoples as crucial partners in the discussion of ABS.

Indigenous peoples have associated the ABS discourse with deep-rooted constitutional dynamics in Canada over Indigenous rights. For many, ABS raises treaty rights, resource rights, even the right to Indigenous self-determination and many other considerations at the ever-constant legal and political flashpoints of Indigenous relations in Canada. In addition, Indigenous participants expressed concern that the historical and colonial divisions and fragmentation of Indigenous peoples along multiple classifications, such as reserve, non-reserve and various other categories, pursuant to the *Indian Act* approach, 'may, but must not be allowed to draw a wedge between Indigenous peoples, preventing collective action on the issue of ABS' (Moncton Focus Group Report, 2015, 7). For Indigenous peoples, ABS can be explored in the light of opportunities laid open in some progressive decisions of the Supreme Court of Canada such as *Calder v. Attorney General British Columbia*; *Delgamuukw v. British Columbia*; *Tsilhqot'in Nation v. British Columbia*; *Daniels v. Canada*; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, etc. ABS may be implicated in these decisions because they deal with a number of considerations, including but not limited to the duty to consult, extinction of rights, considerations of sovereignty, scope of title and whether the rights to genetic resources, mineral rights and associated Indigenous knowledge were ever ceded.

As both ideological and philosophical matters, Indigenous peoples argue that ABS is premised on 'propertization' of knowledge and natural resources under a market economic framework and constructs that are difficult to reconcile with Indigenous worldviews. One aspect of that disconnect is the singling out of genetic resources and even fragmenting them in relation to their specific applications<sup>5</sup> under the ABS framework in contrast to Indigenous holistic outlook on humankind's interconnected relationship with all natural forces and resources. In Canada, as the effect of climate change continues to bear across all ecological regions (particularly the Arctic), Canada's intense quest for resource exploitation continues to put pressure on Indigenous ways of life, including indigenous knowledge and various natural resources raising analogous issues of ABS, equity, justice and sustainability in extractive resource contexts. Consequently, Indigenous peoples insist on the 'need to constitute and support Indigenous legal and organizational structures as part of internal capacity building required by Indigenous peoples' (ABS Canada Ottawa Focus Group, 2016, 7) in the context of ABS. Similar expectations are expressed in relation to Impact Benefit Agreements (IBA) as a tool to secure and balance interest



of Indigenous peoples in the extractive resource industry exploitation. Indigenous concerns over these parallel issues demonstrates the importance of capacity building going forward.

The NP, in the view of Indigenous peoples, is only a prototype of ABS. It neither prejudices relevant existing practices within and outside Indigenous communities nor precludes Indigenous peoples from initiating new options. For example, the FAO International Treaty raises ABS issues in the context of traditional farming, including TK and practices over the utilizations of plant genetic resources for food and agriculture. Yet, Indigenous peoples have noted that under the NP, they ‘have uninhibited freedom to constitute their own competent national authorities, focal points and other structures – including community protocols on ABS in a manner that reflects their ecological identity and the complex dynamic of their historical, regional and political contingencies within the Canadian Federation’ (Moncton Focus Group Report, 2016, 6).

Pushing back on the usual refrain by bureaucrats that it is difficult to identify legitimate stakeholders to effectively perform the duty to consult, Indigenous peoples insist that to the extent that the ‘Canadian “Federation” remains a work in progress, Canada needs to genuinely engage Indigenous peoples on nation-to-nation basis as a threshold imperative for recognition of Indigenous sovereignty and claims for self-determination within the Canadian federation’ (Ottawa Focus Group, 2016, 9). Consequently, the demarcations of authority between the federal and provincial/territorial governments in which the former retains primary jurisdiction over most Indigenous issues while the latter maintains control over natural resources is a derogation of the nation-to-nation principle. In regard to ABS, Indigenous peoples call on the government to recognize the legal status of seventy-three distinct Indigenous Nations across Canada on a nation-to-nation basis (Ottawa Focus Group, 2016, 5) and to establish a national consultation table from the seventy-three Nations of Indigenous peoples ‘to effectively engage with the details of required consultations and negotiations for the implementation of ABS in Canada’ (Moncton Focus Group, 2015, 6).

In the opinion of many Indigenous peoples, the concept of ABS is inherently ironic; it is a regime primarily directed at ensuring justice, fairness and equity, yet governments have capitalized on power and knowledge imbalances among stakeholders with the effect of exacerbating inequality and injustice. For example, as noted earlier, Canada did not fulfill its duty to consult before, during, or after the NP and its antecedent instruments. In addition, there is a lingering concern that Canada continues to engage in sporadically organized sessions on ABS and related matters that have no purposive focus on Indigenous peoples as key partners. As well, ‘federal outreach has largely been directed at large and national Indigenous organizations . . . and not at regional or local groups, who have a better understanding of the situation on the ground and a more direct line to the people being affected by government decision-making’ (Ottawa Focus Group, 2016, 5).

Indigenous peoples are apprehensive that in Canada's current approach to ABS-related negotiations, 'all delegations are led by government officials with limited [if any] input from Indigenous peoples' (Ottawa Focus Group 2016, 7). As noted earlier, the WIPO-IGC is an example of such negotiations where genetic resources, TK, and by extension, ABS, constitute cross-cutting issues between WIPO and the CBD. Further, there is little visible, if any, coordination across the several departments at federal, provincial and territorial levels to demonstrate awareness of the cross-cutting and cross-sectoral nature of ABS.

There is a general recognition that ABS is inherently a complex subject matter due to its cross-sectoral and hi-tech nature. As a consequence, a genuine attempt to recognize and realize the status of Indigenous peoples and enhance their participation in policymaking as key partners would require a proactive commitment on the part of the government to support and finance capacity building and capacity development on ABS and related matters. According to some, such matters could be wide-ranging regarding, for example, development of community protocols, establishment of Indigenous knowledge databases and their management, material transfer and other contractual agreements, revision of existing research protocols to directly accommodate ABS; prioritization of resources to translate relevant documents, simplification of such documents in plain language and enhancing their accessibility, not excluding explanation of key terms, etc. Remarkably, Indigenous peoples were clear that capacity building does not have to be a unidirectional initiative, but 'a two-way or multidirectional exercise. As such, while the governments need to support ABS capacity building in different directions, Indigenous peoples need to educate governments on how to engage and understand Indigenous peoples as important stakeholders in ABS' (Ottawa Focus Group Report, 2016, 10).

Capacity building is an initiative that should come from sources internal and external to Indigenous peoples. Internal capacity building refers to efforts within Indigenous communities to mobilize their members and educate individuals in relevant skills to effectively participate in ABS. This approach is consistent with the opinion of Indigenous leadership. For example, Indigenous lawyer and opinion leader, Roberta Jamieson, emphasizes, in another but relevant context, that Indigenous peoples must lead the charge for change as opposed to demanding new promises and wait in passive expectation for their fulfillment (Jamieson, 2017), which hardly happens. External sources of capacity building include all level of government within Canada and other related development initiatives within and outside of Canada capable of partnering with Indigenous peoples to develop capacity in ABS and related matters. Irrespective of any source or method of capacity building, Indigenous peoples seem to agree: 'all forms of support for capacity building and consultation must involve a transgenerational approach that deliberately engages Indigenous youths in learning and teaching on ABS and related concepts' (Ottawa Focus Group, 2016, 11).